

**Wesnam, Inc., t/a Frederick's Inn and Local 945,
a/w International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of
America. Case 22-CA-11325**

15 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 26 August 1983 Administrative Law Judge Julius Cohn issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wesnam, Inc., t/a Frederick's Inn, Pinebrook, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ In finding that the record supported the inference that the Respondent knew of employee Grau's union activity, the judge pointed to the small size of the workplace. While we agree that the General Counsel has established that the Respondent knew of Grau's activity, we find it unnecessary to rely on the "small plant doctrine" to support the inference.

² In finding that the Respondent unlawfully interrogated employee Mary Taggart, Chairman Dotson applies the test set forth by the Second Circuit in *Bourne v. NLRB*, 332 F.2d 47 (1964).

³ The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge. This case was heard on April 7, 1983, in Newark, New Jersey. Local 945, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, filed charges in Case 22-CA-11325 on which the Regional Director for Region 22 issued a complaint on January 21, 1982. The complaint alleges that Wesnam, Inc., t/a Frederick's Inn, herein called the Company or the Respondent, violated Section 8(a)(1) and (3) of the Act by terminating one of its employees because of her union activities. Additionally, the complaint alleges that the Company independently violated Section 8(a)(1) by interrogating employees, through its general manager, about their membership in, activities

on behalf of, and sympathy for the Union. The Respondent filed an answer denying the commission of any unfair labor practices.

All the parties were given an opportunity to participate, to produce relevant evidence, to argue orally, and to file briefs. Both the Respondent and the General Counsel have filed briefs which have been carefully considered.

On the record of the case¹ and from observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New Jersey corporation, operates a restaurant herein called Frederick's Inn, located in Pinebrook, New Jersey. Currently and at all times material herein the Respondent has been engaged in the retail sale of food and alcoholic beverages, which during the 12 months preceding the issuance of the complaint produced gross revenues in excess of \$500,000. During the same time period the Respondent received goods and materials in excess of \$10,000 directly from enterprises located outside the State of New Jersey and from suppliers located in the State of New Jersey which have received the items from interstate commerce. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES ALLEGED

A. Background

The Respondent operates a restaurant and bar which, at all times material herein, employed approximately 22 people including bartenders, waitresses, and kitchen staff. Fred Simmons, the majority shareholder in Frederick's Inn, is responsible for the overall direction and operation of the business. Lee Roy Hirth, the general manager, supervises all the employees at the restaurant and Kathy Glaab is the hostess. The Union began its organizational campaign in November 1981, having been contacted by employee Vicki Grau.

B. The Facts

1. The termination of Vicki Grau

Vicki Grau worked as a bartender at Frederick's Inn from October 1979 until December 4, 1981, on weekdays from 11 a.m. until 7:30 p.m. In September 1981 she was promoted to head bartender and she was the most senior employee on the staff. Grau's responsibilities included serving customers their drinks and food, making sure the

¹ After the close of hearing, the General Counsel moved to correct the record with respect to certain typographical and minor errors of transcription. There being no opposition, the motion is granted.

bar was supplied with essential equipment, and tapping kegs of beer.

As of November 1981 Grau was the principal organizer and activist on behalf of the Union. Through a customer, she contacted Robert Fusco, a business agent for Local 945. Grau subsequently signed an authorization card and began soliciting support for the Union among her coworkers during working time.

Three meetings between Vicki Grau and union representatives were conducted on the premises of Frederick's Inn. The first meeting, which was held about the evening of November 13, 1981, at the bar, was attended by Robert Fusco, Vicki Grau, waitress Mary Taggart, and bartender Brigid Bott.² None of the employees present were on duty at the time. Union benefits was the primary topic at the meeting which lasted somewhere between 25 minutes to an hour. Vicki Grau gave uncontradicted testimony that Lee Hirth was on the premises at the time.

A second meeting took place several days later while Vicki Grau and Brigid Bott were on duty at opposite ends of the bar. Robert Fusco, his immediate supervisor Anthony Rizzo, and Joseph Abbate, the administrator of the welfare and pension system, congregated at Grau's end of the counter about 2:30 in the afternoon. Mary Taggart, who was waiting on tables, joined the meeting intermittently as she served her customers. Grau testified that during this second meeting Kathy Glaab, the hostess, was standing approximately 15 or 20 feet away. Bott reported that at this second meeting Kathy Glaab asked Bott about the identity of the men with Vicki Grau. The bartender denied any knowledge as to whom Grau was talking with.³

After a brief conversation with Vicki Grau, Anthony Rizzo asked her to point out Fred Simmons, which she did as soon as she spotted him at the other side of the bar. Rizzo, accompanied by Abbate and Fusco, then approached Simmons as the latter was about to exit the restaurant through the front door. According to Fusco's uncontradicted testimony, Rizzo informed Simmons that the Union was in the process of organizing and that it had enough cards to obtain an election.⁴ In addition, Rizzo warned Simmons not to discharge or discipline any employee during the organization drive. Immediately after this encounter, Rizzo, Fusco, and Abbate returned to the end of the bar which Vicki Grau was servicing and Fred Simmons continued out the door of the

restaurant. The union officials were at the restaurant for about 20 minutes.

Several days later Rizzo returned to the bar while Vicki Grau was on duty to pick up a list he had asked her to prepare of employees who had not yet signed authorization cards. He remained at the bar for about 10 minutes.

On November 30, 1981, Lee Hirth terminated Vicki Grau, although she continued to work at the restaurant until December 4, 1981. According to Grau, Hirth told her she was discharged because a man would be better equipped to lift heavy kegs of beer and to get ice. Hirth did not recall giving Grau any specific reason for her dismissal.

2. The interrogation of Mary Taggart

Lee Hirth allegedly interrogated Mary Taggart about the Union immediately after Anthony Rizzo's brief conversation with Fred Simmons. Taggart testified that, after Rizzo, Abbate, and Fusco had returned to Vicki Grau's end of the bar, Hirth approached her at the waitress station. Taggart reported that Hirth, after showing her Rizzo's business card, asked, "Did you see this?" and then "Do you know who joined the Union?" When Taggart replied that she did not know who joined the Union, Hirth laughed, and said, "I would like to join too. Can I be shop steward?"

Robert Fusco, who was seated on a bar stool right next to the waitress station, saw Hirth approach Taggart and speak to her. The business agent heard Hirth say something about a shop steward at which point Fusco turned to Taggart and laughed as Hirth walked away. Taggart, who was also laughing, did not seem upset or concerned as a result of the incident.

Hirth denied that the incident ever took place. On the stand, when asked when he first learned of the Union, the general manager replied that he never knew anything about it. When pressed, however, he admitted that Fred Simmons had informed him of the Union's organizational efforts.

The Respondent attempted to show that, since Simmons left the restaurant immediately after his conversation with the Union, he could not have communicated with Hirth and the latter, consequently, could not possibly have known about the Union, or been in possession of Rizzo's card at the time Mary Taggart was allegedly interrogated. I find that Simmons and Hirth met after the owner's conversation with Rizzo and that Hirth, several minutes later, showed Taggart the union representative's business card and interrogated her. The record clearly shows that Hirth and Simmons could have met in the parking lot where Fred Simmons keeps his car and which is accessible to the kitchen. Alternatively, Simmons could have simply left the restaurant through the front door and reentered through the kitchen, meeting Lee Hirth there.

Having found that the incident between Hirth and Taggart could have happened the way the waitress described it, I find that it did happen that way. Mary Taggart gave forthright testimony and withstood a detailed cross-examination. In addition, both Robert Fusco and

² Mary Taggart was terminated in March 1982. Brigid Bott was still employed at Frederick's Inn at the time of the hearing. However, between Grau's discharge and the hearing, Bott changed her name to O'Connell by marriage. For the sake of convenience she will be referred to as Brigid Bott herein.

³ Grau testified she saw that Kathy Glaab looked over in her direction and spoke to Bott during the third meeting rather than the second. I find Bott accurately testified that the incident occurred during the second meeting. Since Bott was herself involved in the conversation with Glaab she would have the more accurate recollection. Moreover, there is no evidence in the record that Bott even observed the third meeting between Grau and the Union. Finally, both Grau and Bott agreed that Glaab was in the immediate vicinity at the time of the second meeting.

⁴ The Respondent disputes the veracity of Rizzo's claim that he had enough cards to force an election. The Union's strength in the bargaining unit, however, is irrelevant to both allegations raised by the complaint.

Vicki Grau corroborated Taggart's account. Finally, Hirth seriously undermined his own credibility when he at first glibly denied having any knowledge of the Union prior to Grau's termination. The statement was so obviously untrue that he was forced to retract it almost immediately on cross-examination.

C. Discussion and Analysis

1. The discharge of Vicki Grau

The evidence in the record strongly supports the conclusion that Vicki Grau was discharged because of her union activity in violation of Section 8(a)(3) and (1) of the Act. Grau's active role in union organizing is undisputed. Moreover, the Employer's protestation that management was unaware of her activities is unpersuasive.

The Respondent was clearly aware that the Union was conducting an organizing drive at Frederick's Inn once the union officials spoke to Fred Simmons. Furthermore, circumstantial evidence suggests that the Respondent knew through at least one of its supervisors, Simmons, Lee Hirth, or Kathy Glaab, that Vicki Grau was at the center of the organizational activity.⁵

The Respondent disputes Glaab's supervisory status. I find that Kathy Glaab as hostess at Frederick's Inn was a supervisor at all times material herein. Glaab's responsibilities included greeting customers, designating work areas for waitresses, and telling the staff when to pick up food and when to clean tables. Lee Hirth admitted on the stand that Glaab interviewed applicants for waitress positions and that at least two waitresses were hired by the hostess with Hirth's subsequent approval. Hirth also acknowledged on the stand that Glaab had the authority to recommend the dismissal of waitresses. Mary Taggart credibly testified as to a staff meeting conducted by Hirth at which the general manager instructed the assembled waitresses that Kathy Glaab was in charge and that her directives were to be followed.

Finally, Hirth's contention that the hostess was not a supervisor is contradicted by the affidavit he gave to a Board agent in which he characterized Glaab as a "supervisor [with] the power to hire and fire." In light of Glaab's broad power to direct the waitress staff and to make effective recommendations as to hiring and firing, I find she is a supervisor within the meaning of Section 2(11) of the Act.⁶

The likelihood that either Kathy Glaab, Lee Hirth, or Fred Simmons observed Vicki Grau's union activity is overwhelming. Three times Vicki Grau was visited by union officials during business hours. At least as to the first two instances, there is clear, uncontradicted evidence that one of the three was in the immediate vicinity.

Grau gave uncontradicted testimony that during the first meeting she observed Lee Hirth on the restaurant premises. At the second meeting all three supervisors were present. It was during this second meeting that

Rizzo and his colleagues left Grau's station at the bar in order to approach Fred Simmons. Immediately after their conversation with Simmons the union officials returned to the section of the bar where Vicki Grau was on duty. At the very moment that the union officials were engaged in conversation with Grau, Lee Hirth was several feet away, at the waitress station, questioning Mary Taggart about the Union. Also, during this second union meeting at Frederick's Inn Kathy Glaab, at the other end of the bar, betrayed her interest in Vicki Grau's activities by questioning Brigid Bott about Grau's companions.

In addition to receiving the three union visits at Frederick's Inn, Vicki Grau made her union activities obvious by openly soliciting on the Local's behalf among her co-workers during working hours. Grau's highly visible organizational efforts combined with the small size of the workplace and the constant interaction between management and staff provide a sound basis for the inference that the Respondent was indeed aware of her activities.⁷

Having established that the Respondent was aware of Vicki Grau's organizational activities, I find that this knowledge motivated her dismissal on November 30. The short period of time between the onset of Grau's activities, sometime in mid-November, and her termination is itself evidence that the Respondent acted with a discriminatory motive.⁸

The smorgasbord of contradictory reasons offered by the Respondent are clearly pretextual. On the stand Lee Hirth at first indicated that Grau was terminated because her work was not up to par and because she had grown complacent and unenthusiastic. When pressed on cross-examination Hirth admitted that other bartenders with less seniority and similar problems were not terminated.

Hirth also testified that Grau had been warned several times about her sloppy appearance, that her pants were too tight and had holes in them and that her blouse was too big. Grau contended that she herself had complained to the restaurant about the uniforms it supplied. In any case, it is clear that the uniform problem was corrected well before Grau was terminated and was not a motivating factor in the Respondent's decision.

The Respondent also cites figures ostensibly demonstrating that Grau's sales were lower than those of the other bartenders and her ultimate replacement. The figures, which were not offered or received into evidence, are inherently suspect because their precise origin was never made clear in the record. Furthermore, uncontra-

⁵ *Florida Cities Water Co.*, 247 NLRB 755 (1980); *Weise Plow Welding Co.*, 123 NLRB 616 (1959).

The parties are in dispute as to whether an intercom system connecting the bar and the office enabled the Respondent to overhear conversations between Vicki Grau and the union officials; I find the evidence surrounding this controversy insubstantial and unnecessary. In introducing the intercom evidence, the General Counsel made no showing as to who used the office or how often it was in use, thus making the likelihood that management actually engaged in eavesdropping impossible to determine. Furthermore, credible testimony indicated that conversations at the bar were generally inaudible in the office because of noise in the restaurant. Finally, in light of other persuasive evidence supporting an inference of knowledge, testimony as to the intercom is, at best, merely cumulative.

⁸ *Marsden Electric Co.*, 226 NLRB 1097, 1099 (1976), *enfd.* 586 F.2d 8 (6th Cir. 1978).

⁵ See *Famet, Inc.*, 202 NLRB 409 (1973), *enfd.* 490 F.2d 293 (9th Cir. 1973), for the well-settled principle that knowledge of union activity can be inferred from the circumstances.

⁶ *Howard Johnson Co.*, 236 NLRB 1206 (1978); *Ogden Food Service Corp.*, 234 NLRB 303 (1978); *Sheraton Motor Inn*, 210 NLRB 790 (1974).

dicted evidence demonstrates that bartenders do not necessarily ring up their sales at the register at their respective stations. It is therefore impossible to accurately determine the sales per bartender. More to the point, however, there is no evidence that sales figures were ever tabulated prior to Grau's discharge. Any study done after her termination is obviously irrelevant on the question of motive.

In an affidavit to a Board agent and according to Grau in the termination interview, Hirth indicated that he had wanted to replace the barmaid with a male bartender, who was better able to do heavy lifting. Hirth's unabashed admission of sex discrimination aside, this excuse for terminating Vicki Grau is simply unpersuasive. In the first place, both Grau and Brigid Bott testified that the job requires very little lifting. Kegs of beer are put into place by delivery people. Occasionally the kegs have to be shifted in order to hook up the tap, but no lifting is involved. Ice is obtained from a barrel on wheels and travels on a dumbwaiter. The barrel is lifted by the bartender and a coworker and dumped into the sinks. In short, at no time have the female bartenders been incapable of performing any part of the job.

Hirth admitted on the stand that Grau was a competent, dependable employee, a fact which is underscored by the bartender's promotion just 2 months before her termination and prior to the onset of her union activity.

The general manager undermined his own credibility frequently by retracting statements as soon as he was pressed about their meaning. For example, Hirth characterized Grau as a good dependable worker "when she was there." When asked on cross-examination to explain this qualification, he retracted it. Similarly, in an affidavit given to a Board agent Hirth explained that he let Vicki Grau go while he kept less senior employees in order to weed problems out at the top. When questioned on cross-examination as to the logic behind this policy, Hirth admitted making the statement, but denied that it accurately explained his decision to fire Grau.

The Respondent's approach in offering a plethora of inconsistent, illogical, and unsubstantiated reasons for Grau's termination buttresses the conclusion that the Respondent's attempts to explain its decision are mere pretext.⁹

2. The interrogation

Lee Hirth's encounter with Mary Taggart at the wait-res station was an unlawful interrogation within the 8(a)(1) prohibition. The test is whether the questioning reasonably tends to restrain or interfere with employees in the exercise of their Section 7 rights in light of all of the surrounding circumstances.¹⁰ Hirth's confrontation of Taggart with Rizzo's business card and questioning "Did you see this?" and "Do you know who joined the Union?" clearly had this tendency, particularly in light

of the Respondent's subsequent unlawful termination of Grau.

The fact that Hirth softened his question with a joke about being shop steward and that Taggart did not appear upset by the encounter is not controlling. It is well settled that the correct inquiry is not whether the employee is in fact coerced, but whether the employer's conduct tends to have that effect.¹¹

IV. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily discharged Vicki Grau as set forth above, I shall recommend that the Respondent be ordered to offer her immediate and full reinstatement to her former position or to a substantially equivalent position without prejudice to her seniority or other rights and privileges, and to make her whole for any loss of earnings or other monetary loss she may have suffered as a result of the discrimination against her, less interim earnings, if any, plus interest to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).¹²

I shall also recommend that the Respondent expunge from its records any reference to the unlawful discharge of Grau and inform her that this will not be used as a basis for further personnel actions concerning her.¹³

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily discharging Vicki Grau, the Respondent engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act.

4. By coercively interrogating Mary Taggart concerning the Union, the Respondent has violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

⁹ Because I find that the Employer's purported reasons for terminating Grau are merely pretextual, designed to mask a discriminatory motive, an analysis under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), is unnecessary. See *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983).

¹⁰ *Florida Ambulance Service*, 255 NLRB 286 fn. 1 (1981).

¹¹ *Hedison Mfg. Co.*, 260 NLRB 1037, 1038 (1982).

¹² See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

¹³ *Sterling Sugars*, 261 NLRB 472 (1982).

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Wesnam, Inc., t/a Frederick's Inn, Pinebrook, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in or activities on behalf of Local 945, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discharging employees or otherwise discriminating against them in any manner with regard to their hire or tenure of employment or any terms and conditions of employment because of their union activities.

(b) Coercively interrogating employees concerning their knowledge of union activities or their union sympathies.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act.

(a) Offer Vicki Grau immediate and full reinstatement to her former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of pay due to the violation against her, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its files any reference to the discharge of Vicki Grau and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(d) Post at Frederick's Inn in Pinebrook, New Jersey, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by

the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate employees about their knowledge of union activities or their union sympathies.

WE WILL NOT discharge employees because they have engaged in activities on behalf of Teamsters Local 945, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Vicki Grau immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges.

WE WILL make her whole for any loss of pay or benefits she may have suffered by reason of our discrimination against her, with interest.

WE WILL expunge from our files any reference to the discharge of Vicki Grau on November 30, 1981,

WE WILL notify her that this has been done, and that evidence of this unlawful discharge will not be used as a basis for future personnel action against her.

WESNAM, INC., T/A FREDERICK'S INN

¹⁵ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."